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SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS,
Appellant,

v.

ILLINOIS

—
APPEAL FROM THE SUPREME COURT OF ILLINOIS

—
APPELLANT'S BRIEF
—

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TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	
◦ INVOLVED	2
STATEMENT	6
ARGUMENT	11
Illinois Statutes Which Authorize a Pauper's Imprisonment in Excess of the Maximum Period Otherwise Set by Law at the Rate of Five Dollars Per Day, Despite the Fact That He is Willing and Able to Pay a Fine and Court Costs if Given the Opportunity, Violate the Equal Protection Clause of the Fourteenth Amendment.	11
CONCLUSION	29

AUTHORITIES CITED

Cases:

Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967)	19
Anders v. California, 386 U.S. 738 (1967)	25
Anderson v. Ellington, 300 F.Supp. 789 (M.D. Tenn. 1969) ...	23
Ariel v. Massachusetts, ___ Mass. ___, 248 N.E.2d 496 (1969) appeal dismissed, 24 L.Ed.2d 468 (1970)	17
Baker v. Binder, 374 F.Supp. 658 (W.D.Ky. 1967)	19
Berkenfield v. People, 191 Ill. 272 (1901)	12
Buck v. Alex, 350 Ill. 167, 182 N.E. 794 (1932)	22
Burns v. Ohio, 360 U.S. 252 (1959)	24
City of Chicago v. Morell, 247 Ill. 383, 93 N.E. 295 (1911)	23
Cox v. Rice, 375 Ill. 357, 31 N.E.2d 786 (1947)	22
Douglas v. California, 372 U.S. 353 (1962)	24, 25, 26
Draper v. Washington, 372 U.S. 487 (1963)	24

(ii).

Duncan v. Louisiana, 391 U.S. 145 (1968)	14
Edwards v. California, 314 U.S. 160 (1941)	19
Eskridge v. Washington State Board, 357 U.S. 214 (1958)	24
Ex Parte Jackson, 96 U.S. 727 (1877)	24
Fenster v. Learcy, 30 N.Y.2d 309 (1967)	19
Frank v. United States, 395 U.S. 147 (1969)	14
Gardner v. California, 393 U.S. 367 (1969)	25
Griffin v. Illinois, 351 U.S. 12 (1956)	24, 25, 26, 31
Harper v. Virginia Board of Elections, 383 U.S. 663 (1965)	25, 26
Hill v. Wampler, 298 U.S. 460 (1936)	24
Kennedy v. People, 122 Ill. 649, 13 N.E. 213 (1887)	23
Kettles v. People, 221 Ill. 221, 77 N.E. 472 (1906)	23
Lane v. Brown, 372 U.S. 477 (1963)	24
Lawyer Title of Phoenix v. Gerber, 44 Ill.2d 145, 254 N.E. 2d 461 (1969)	22
Long v. District Court of Iowa, 385 U.S. 192 (1966)	25
Loving v. Virginia, 388 U.S. 1 (1967)	25, 26
McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969)	25
McLaughlin v. Florida, 379 U.S. 184 (1964)	23-24, 26
Maggio v. Zeitz, 333 U.S. 56 (1948)	18
Martin v. Erwin (USDC WD La., January 25, 1968; Supple- mental Order, February 27, 1968, Civil No. 13084)	20
Morris v. Schoonfeld, 301 F.Supp. 158 (D.Md. 1969); juris- dictional statement filed No. 782, October 28, 1969, 38 U.S.L. Week 3162	28-29
North Carolina v. Pearce, 395 U.S. 711 (1969)	18, 28, 29
People v. Collins, 47 Misc.2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965)	31
People ex. rel. Herring v. Woods, 37 Ill.2d 435, 226 N.E.2d 594 (1967)	27
People v. Hedenberg, 21 Ill.App.2d 504 (1959)	13, 16
People v. Herman, 245 Ill.App. 94 (1927)	13

(iii)

People v. Jaraslowski, 254 Ill. 299 (1912)	12
People v. McMillan, 53 Misc.2d 685, 279 N.Y.S.2d 941 (Orange County Court 1967)	31
People v. Saffore, 18 N.Y.2d 271 N.Y.S.2d 972, 218 N.E. 686 (1966)	26
People v. Walker, 286 Ill. 541, 122 N.E. 92 (1919)	23
People v. Zito, 237 Ill. 434 (1909)	13, 23
Petition of Blacklidge, 359 Ill. 482, 195 N.E. 3 (1935)	22
Re Gault, 387 U.S. 1 (1967)	14
Ricks v. District of Columbia, 414 F.2d 1097 (D.C.Cir. 1968)	19
Rinaldi v. Yeager, 384 U.S. 305 (1966)	21, 23, 25
Roberts v. Lavalle, 389 U.S. 40 (1967)	25
Robinson v. California, 370 U.S. 660 (1962)	19
Sawyer v. District of Columbia, 238 A.2d 314 (D.C.App. 1968)	27
Smith v. Bennett, 365 U.S. 708 (1961)	25
Smith v. Hill, 385 F.Supp. 556 (E.D.N.Y. 1968)	19
Strattman v. Studt, 2d Ohio st. 2d, ____ N.E. 2d ____ (1969)	23
Swenson v. Bosler, 386 U.S. 258 (1967)	25
United States <i>ex rel.</i> Privatera v. Kross, 239 F.Supp. 118 (S.D.N.Y. 1965) <i>aff'd</i> 345 F.2d 533 (2nd Cir. 1965), <i>cert. denied</i> , 382 U.S. 911 (1965)	27, 28
Williams v. City of Oklahoma City, 395 U.S. 458 (1969)	25
Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968)	23
<u>Statutes:</u>	
28 U.S.C. § 1257(2)	1
29 U.S.C. § 206	19
Cal. Pen. Code Section 1205	20
Md. Ann. Code Art. 52 Sec. 18	20
Mass. Ann. Laws ch. 279, Section 1A (1956)	20

Mich. Stats. Ann. Sec. 28.1075 (1959)	20
Pa. Stat. Ann. Title 19, Section 953-56 (1964)	20
S.C. Code Ann. Section 55-593 (1962)	20
Utah Code Ann. Section 77-53-17 (1953)	20
Wash. Rev. Code Ann. Sec. 9.92.070 (1961)	20
Wis. Stat. Section 57-04 (Supp. 1965)	20
Section 72 of the Illinois Civil Practice Act	8
Section 180-4 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967 ch. 38)	5, 20
Section 180-6 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38)	Passim
Section 1-7(k), Criminal Code of 1961 (Ill. Rev. Stat. 1967, ch. 38.)	10, 11, 12, 21, 22
Ill. Rev. Stat. 1967, ch. 38, par. 16-1	4, 6
Model Penal Code, Proposed Official Draft, § 302.2 (1962)	21
<u>Other Authorities:</u>	
American Law Institute's Model Penal Code (Proposed Official Draft, 1962)	15
CCH Poverty Law Reporter 750	20
Chicago Daily News, January 21, 1970	14
Chicago Daily News, January 20, 1969	14
Chicago Sun Times, January 22, 1970	14
Fines and Fining—An Evaluation, 101 U.Pa. L.Rev. 1013 (1953)	20
Foote, The Coming Constitutional Crisis in Bail, 113 U. of Penn. L.R. 1125 (1965)	14
Packer, The Limits of the Criminal Sanction	15
Report of the President's Commission on Crime in the District of Columbia, (1966)	30
The President's Commission on Law Enforcement and Admin- istration of Justice—Task Force Report: The Courts 18 ..	16, 30
Report of the President's Commission on Law Enforcement and Administration of Justice	16

Report on Penal Institutions, Probation and Parole (1931)	30
The Law of Criminal Correction, (1963) Rubin, Weihofen and Rosenzweig	15
Subin, Criminal Justice in a Metropolitan Court. (1966)	30
Sutherland and Cressey, Principles of Criminology, (5th Ed. 1955)	15
12 Welfare Law Bulletin 14, April 1968	20

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OPINION BELOW

The opinion of the Supreme Court of Illinois affirming denial of appellant's motion to vacate that portion of his sentence which directed that he stand committed to the Cook County Jail in default of payment of \$505 fine and costs is reported at 41 Ill.2d 511, 244 N.E. 2d 197 (1969) and is set forth in the Appendix at pp. 36-41. There was no opinion in the court of first instance, the Fourth Municipal District of the Circuit Court of Cook County, Illinois.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of statutes of the State of Illinois as being repugnant to the Constitution of the United States, their validity having been upheld in the courts of the state. This Court noted probable jurisdiction on January 19, 1970.

QUESTION PRESENTED

Whether Illinois statutes which authorize a pauper's imprisonment in excess of the maximum period otherwise set by law, at the rate of five dollars per day for payment of a fine and costs, despite the fact that he is willing and able to pay them if given the opportunity, violate the Equal Protection Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case involves the following statutes of the State of Illinois:

1. Illinois Rev. Stat. 1967, ch. 38, par. 1-7

Judgment, Sentence and Related Provisions

(a) Conviction and Sentence.

A person convicted of an offense shall be sentenced as provided in this Section.

(b) Determination of Penalty.

Upon conviction, the court shall determine and impose the penalty in the manner and subject to the limitations imposed in this Section.

* * *

(d) Authorized Penalties.

Except as otherwise provided by law, a person convicted of an offense may be:

- (1) Sentenced to death; or
- (2) Sentenced to imprisonment as authorized by Subsections (e) and (f) of this Section; or
- (3) Ordered to pay a fine authorized by Subsection (i) of this Section; or

- (4) Placed on probation; or
- (5) Ordered to pay a fine and placed on probation; or
- (6) Sentenced to imprisonment and ordered to pay a fine.

(e) Penitentiary Sentences.

All sentences to the penitentiary shall be for an indeterminate term. The court in imposing a sentence of imprisonment in the penitentiary shall determine the minimum and maximum limits of imprisonment. The minimum limit fixed by the court may be greater but shall not be less than the minimum term provided by law for the offense and the maximum limit fixed by the court may be less but shall not be greater than the maximum term provided by law for the offense.

(f) Sentences other than to Penitentiary.

All sentences of imprisonment other than to the penitentiary shall be for a definite term which shall not exceed one year.

(g) Mitigation and Aggravation.

For the Purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

* * *

(j) Penalty Where Not Otherwise Provided.

The Court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offender to a term of imprisonment not to exceed one year or a fine not to exceed \$1,000, or both.

(k) Working out Fines.

A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; provided, however, that in such judgment imposing the fine the court may further order that upon nonpayment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of \$5.00 per day of imprisonment; provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months.

(1) Place of Confinement.

When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, a sentence of more than one year shall be to the penitentiary, and a sentence not to exceed one year shall be to a penal institution other than the penitentiary. . . .

2. Ill. Rev. Stat., 1967, ch. 38, par. 180-6

Discharge of Pauper

Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment.

3. Ill. Rev. Stat. 1967, ch. 38, par. 16-1:

Theft

A person commits theft when he knowingly:

- (a) Obtains or exerts unauthorized control over property of the owner; or
- (b) Obtains by deception control over property of the owner; or
- (c) Obtains by threat control over property of the owner; or
- (d) Obtains control over stolen property knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe the property was stolen, and
 - (1) Intends to deprive the owner permanently of the use or benefit of the property; or
 - (2) Knowingly uses, conceals or abandons the property in such a manner as to deprive the owner permanently of such use or benefit; or
 - (3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty

A person first convicted of theft of property not from the person and not exceeding \$150 in value shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding \$150 in value shall be imprisoned in the penitentiary from one to 10 years.

4. Ill. Rev. Stat. 1967, ch. 38, par. 180-4

Judgment lien on property, real and personal—Execution

The property, real and personal, of every person who shall be convicted of any offense, shall be bound, and a lien is hereby created on the property, both real and personal of

every such offender, not exempt from execution or attachment, from the time of finding the indictment at least so far as will be sufficient to pay the fine and costs of prosecution. The clerk of the court in which the conviction is had shall upon the expiration of thirty (30) days after judgment is rendered issue an execution for any fine that remains unpaid, and all costs of conviction remaining unpaid; in which execution shall be stated the day on which the arrest was made, or indictment found, as the case may be. The execution may be directed to the proper officer of any county in this State. The officer to whom such execution is delivered shall levy the same upon all the estate, real and personal, of the defendant (not exempt from execution), possessed by him on the day of the arrest or finding the indictment, as stated in the execution and any such property subsequently acquired; and the property so levied upon shall be advertised and sold in the same manner as in civil cases, with the like rights to all parties that may be interested therein. It shall be no objection to the selling of any property under such execution, that the body of the defendant is in custody for the fine or costs, or both.

STATEMENT

On June 24, 1967, appellant, Willie E. Williams, was arrested for the crime of theft of property not from the person, and not exceeding \$150 in value, Ill. Rev. Stat. 1967 ch. 38, par. 16-1, (A.2) and charged with having "knowingly obtained unauthorized control over credit cards, checks and papers of the value of less than one hundred and fifty dollars, the property of Edna Whitney, intending to deprive the said Edna Whitney permanently of the use and benefits of said property." (Ibid).

August 14, 1967, he was brought before the Circuit Court of Cook County at suburban Maywood, Illinois for arraignment; bail was set at \$2,000 (A.5,6). Unable to post bail, appellant remained in custody. (A.12). The court

continued the case to August 16, 1967, and committed Williams to the custody of the sheriff. (A.6). August 16, 1967, on motion of the State Attorney, the case was continued to September 6, 1967 (A. 7).

September 6, 1967, appellant entered a plea of not guilty and "waived" his right to trial by jury. (A.8) Williams was at no time represented by counsel during the proceedings in the trial court (A. 8, 13).¹ After trial, the Honorable Joseph R. Gill found appellant guilty as charged (A.9) and sentenced him to the maximum term of imprisonment for a first offense authorized by Illinois law: one year in the Cook County Jail (A.9). Judge Gill further sentenced appellant:

...to pay the Clerk of this Court, to be by said Clerk disposed of according to law, a fine in the sum of FIVE HUNDRED DOLLARS (\$500) and also the costs of this suit taxed at FIVE DOLLARS (\$5.00) and in default of payment of said fine, it is ordered that said defendant, after the expiration of said term of imprisonment, stand committed in said County Jail until said fine and costs shall have been paid or until said defendant shall have been discharged according to law. (Ibid.)²

¹Williams was tried in a suburban court where there is no regularly assigned public defender or official court reporter. Without a transcript, it is impossible to determine authoritatively whether the magistrate in this case advised Williams of his right to appointed counsel. Counsel for appellant are informed, however, that the practice in the Maywood court is that if a defendant requests an appointed counsel, the case is transferred to the central court of the District where there is a Public Defender regularly assigned one day per week, but that a criminal defendant is not otherwise apprised of his right to counsel.

²Judge Gill thus imposed the maximum term of imprisonment and fine permitted upon a first conviction of the crime of theft of property not from the person and not exceeding \$150 in value, Ill. Rev. Stat. 1967 ch. 38, par. 16-1.

November 29, 1967, with the assistance of attorneys associated with the Civil Legal Aid Service in the Cook County Jail,³ appellant filed a petition under Section 72 of the Illinois Civil Practice Act and under Ill. Rev. Stat. 1967, ch. 38, par. 180-6, to vacate that portion of the trial court's order of September 6, 1967, which directed that Williams remain imprisoned upon expiration of his one year jail sentence for petty theft, in default of payment of the \$500 fine and \$5 in costs (A.12).

In the petition, Williams affirmed under oath that he was then an indigent inmate of the Cook County Jail and had no estate, funds, or valuable property whatsoever (A.12);

that he was financially unable to obtain counsel at the time of his trial and was never advised by the trial court of his right to have counsel assigned;

that when he was sentenced on September 6, he was unable to pay the \$505 fine and costs (as should have been apparent to the trial court as he had not been able to furnish the 10% deposit on his \$2,000 bond which would have authorized his release under Illinois law) or to retain an attorney;

that he had been incarcerated since August 13, 1967, and therefore incapable of earning a livelihood;

that he remained on the date of the petition without funds to pay the \$505 fine and costs;

³The Civil Legal Aid Service in the Cook County Jail was established in 1966 by the Center for Studies in Criminal Justice, University of Chicago Law School, with a grant from the Ford Foundation. In recognition that the need of prisoners for legal assistance on civil matters extends far beyond the conventional types of civil cases, the Civil Legal Aid Service has filed petitions for habeas corpus and sought other forms of post-conviction relief on behalf of prisoners, as well as engaged in the more traditional types of civil representation. There were no criminal defense services available to litigate appellant's challenge to his imprisonment for inability to pay a fine. Thus, the Civil Legal Aid Service undertook representation of the appellant as being properly within the mandate of its program.

and finally that "defendant will be able to get a job and earn funds to pay the fine and costs if he is released from jail upon expiration of his one year sentence " (A.13).

At the November 29, 1967, hearing on the petition, held before Judge Gill, the judge who had sentenced appellant, no court reporter was present.⁴ At no time subsequent to the filing of the petition, however, did the state traverse its factual allegations or offer evidence challenging the allegations of the petition. (A.25,26). Appellant's counsel summarized the allegations of the petition and the State's Attorney moved that it be denied. (Ibid). Judge Gill denied the petition on its face;

"... for the reason that petitioner was not legally entitled at that time to the relief requested in the petition, *because he still has time to serve on his jail sentence and when that sentence has been served financial ability to pay a fine might not be the same as it is of the date of September 6, 1967.*" (Italicized portion written into the bill of exceptions by Judge Gill.) (A.26)

Notice of appeal to the Supreme Court of Illinois from Judge Gill's order denying appellant's petition was filed on November 30, 1967 (A. 16), and the appeal was argued orally on May 16, 1968 (A.31) May 23, 1968, appellant completed service of his one year sentence, less time off for good conduct and for time spent in custody prior to trial, and began to serve the period of incarceration required to satisfy the \$505 fine and costs, at the statutory rate of \$5 per day. (A.31). On May 28, 1968, the Supreme Court of Illinois, on motion of appellant's counsel, set bail for appellant pending his appeal at \$500. (A.35). The 10% deposit (\$50), \$45 of which is refundable, was posted by the Civil Legal Aid Service.

⁴In accord with an order dated January 30, 1968, of a Justice of the Supreme Court of Illinois, appellant constructed a bystander's bill of exceptions covering the proceedings of November 29, 1967, without waiving his objections to the validity and propriety of non-reported proceedings: (A.22-26).

Appellant argued before the Supreme Court of Illinois that his imprisonment for default in payment of a fine and costs, pursuant to Ill. Rev. Stat. 1967, ch. 38, § 1-7(k), and his exclusion from coverage of Ill. Rev. Stat. 1967, ch. 38, § 180-6 (which provides for discharge from imprisonment under specified circumstances) rendered both statutes unconstitutional under the Fourteenth Amendment.

On January 29, 1969, the Illinois Supreme Court affirmed the judgment of the lower court denying appellant's petition,⁵ and held that there is no denial of equal protection of the laws when an indigent defendant is imprisoned to satisfy payment of a fine and costs (A.37, 40).

Appellant filed timely notice of appeal to this Court on February 11, 1969 (A.48). By an order of February 13, 1969, the Supreme Court of Illinois stayed its mandate pending final disposition of the appeal (A.47). On January 19, 1970, the Court noted probable jurisdiction (A.49).

⁵The Supreme Court of Illinois characterized the denial of relief by the trial court as "because of its legal insufficiency." (A.36). By this holding, and by releasing appellant on bail subsequent to the completion of one year in prison, the court appears to have rejected any suggestion of an alternate holding by the trial court that the petition was premature (A.26). The Supreme Court, of course, went on to decide appellant's constitutional claim on the merits.

ARGUMENT

Illinois Statutes Which Authorize a Pauper's Imprisonment in Excess of the Maximum Period Otherwise Set by Law, at the Rate of Five Dollars Per Day, Despite the Fact That He Is Willing and Able To Pay a Fine and Costs if Given the Opportunity, Violate the Equal Protection Clause of the Fourteenth Amendment.

After conviction for a petty theft, appellant Willie Williams was sentenced to confinement in the Cook County jail for the term of one year and to pay a fine of \$500 and costs taxed at \$5 (A.9). Should Williams default in payment, the trial court ordered that he "stand committed in said County Jail until said fine and costs shall have been paid or until said defendant shall have been discharged according to law" (A.9).⁶ Pursuant to § 1-7(k) of the Criminal Code of 1961 (Ill. Rev. Stat. 1967, ch. 38),⁷ if

⁶The judgment further command that the Sheriff "take the body of said defendant and the keeper of said jail is hereby commanded to receive the body of said defendant into his custody and confine said body in said County Jail in safe and secure custody for and during said term as aforesaid, and after the end of said term of imprisonment, the keeper of said jail is hereby commanded to continue to confine the body of said defendant in said County Jail in safe and secure custody until said fine shall have been paid or until said defendant shall have been discharged according to law, and after the expiration of said fixed term of imprisonment as aforesaid, said defendant shall be thereafter discharged."

"It is further ordered that execution issue herein against said defendant for the amount of said fine" (A.9, 10).

⁷This section provides, "Working out Fines. A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of \$5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

appellant did not pay the fine of \$500 and costs of \$5, they would be "satisfied at the rate of \$5 per day of imprisonment" provided however, that no person "shall be imprisoned . . . for a longer period than 6 months."

Williams alleged "under oath that he was indigent at all stages of the proceedings, that he was without counsel or funds to hire counsel at the trial and that he will be able to get a job and earn funds to pay the fine and costs if he is released from jail upon expiration of his one-year sentence" (A.36). But both the trial court and Supreme Court of Illinois refused to alter his commitment to jail in default of the payment of the fine and costs.

It is plain from the opinion of the Supreme Court in appellant's case, and prior Illinois decisions, that the Supreme Court of Illinois regards the incarceration of a defendant who cannot pay a fine or costs as a punitive exaction by the state which is considered the equivalent of the fine or costs⁸ and thus not an invidious classification which violates the Equal Protection Clause.

⁸In *Berkenfield v. People*, 191 Ill. 272 (1901) a defendant was convicted for obtaining credit by means of false and fraudulent statements and sentenced to one year imprisonment, fined \$1,000 (and costs) under the predecessor to Section 1-7(k) and required to work out his fine at the rate of \$1.50 per day. The court held that a jail term was imposed "not as punishment for the commission of a crime, but to enforce the payment of the fine and costs" (191 Ill. at 278) and that otherwise the sentence or imprisonment and fine would be satisfied by imprisonment only.

In *People v. Jaraslawski*, 254 Ill. 299 (1912) the defendant was found guilty of obtaining money by false pretenses and sentenced to one year imprisonment and fined \$500. The judgment order directed that upon non-payment of the fine defendant would be required to work it out at \$1.50 per day. The court held:

"Even though there might be circumstances under which a person would be entitled to be released, under paragraph 455 of the Criminal Code, from working out his fine in the house of correction, yet the mere fact that he is a pauper and has no money to pay the fine does not entitle him to such release."

Analysis reveals, however, that the premise of the Illinois court's reasoning in appellant's case—that giving a wealthy man the choice of paying the \$505 or serving 101 days is the equivalent of requiring the poor man to serve 101 days—is palpably false. To be sure, a fine may be a burdensome penalty in specific cases. Depending on the rate at which it may be “worked off”, there may even be times when it is a more onerous penalty than imprisonment. It would be to blink at reality, however, to ignore that the state has imposed a far heavier burden on the poor in general, and appellant Williams in particular, by attempting to equate a choice of serving 101 days in jail or paying a \$505 fine with the necessity of serving the prison sentence. The fact is that the man without \$505—although alleging that he can

In *People v. Herman*, 245 Ill. App. 94 (1927) the defendant was convicted of assault with a deadly weapon, sentenced to one year imprisonment and fined \$1,000 plus costs:

“Where a proper order is entered under §391, requiring payment of a fine in labor at \$1.50 per day, the defendant cannot secure a discharge under §766 by showing he has ‘no estate wherewith to pay such fine and costs or cost only.’ He must nevertheless pay in labor, as provided in the order, at least unless he can show he is unable to perform labor.”

In *People v. Zito*, 237 Ill. 434 (1909) a judgment was obtained against defendant for selling cocaine and he was committed to the county jail until his fine and cost were paid at the rate of \$1.50 per day. It was held:

The constitutional prohibition against imprisonment for debt does not extend to actions of debt for fines and penalties inflicted for violations of the penal laws of the State and it is not error for the judgment in such action to order defendant committed to jail until the penalty is paid.

In *People v. Hedenberg*, 21 Ill. App. 2d 504, 510 (1959) the defendant was convicted of attempting to set fire to a motor vehicle and fined \$1,000 to be worked out at the rate of \$5.00 per day but was released because physically unable to work, the Court stating:

“here defendant is being retained in jail at a rate of \$5.00 for each day spent in confinement so instead of the state realizing a return from a prisoner's labor; to be applied on his fine, it was incurring the expense of housing and feeding him. That result was not intended by the lawmakers.”

and will earn such if allowed his liberty—is subjected mandatorily to severance of family relations, loss of pay, loss of employment, loss of educational opportunity, and the normally dismal, if not inhumane, conditions in short term detention facilities—poor food, and housing, overcrowding, inadequate recreational and other facilities, essential rudimentary comfort and decency.⁹ Cf. *Re Gault*, 387 U.S. 1, 27 (1967). In short, he is deprived of the things that make life worth living while the man with \$505 is burdened with a necessary inconvenience. As this Court said in *Frank v. United States*, 395 U.S. 147, 151 (1969) “Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself.”¹⁰ Cf. *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968).

That both fine and imprisonment are labelled criminal punishments by a state has not misled observers of the criminal process to regard them as fungible. Thus, it is

⁹Short term detention facilities in Illinois are in a deplorable condition, and fully support the conclusion of “a leading penologist” that such facilities are “the lowest form of social institution on the American scene.” Foote, *The Coming Constitutional Crisis in Bail*, 113 U. of Pa. Rev. 1125, 1144-45 (1965). On January 20, 1969 the Chicago *Daily News* reported critical findings of a survey of city and county jails financed by the Ford Foundation and the Illinois Law Enforcement Commission and conducted by the University of Chicago’s Center for studies in Criminal Justice under the direction of of criminologist Hans W. Mattick and attorney Ronald P. Sweet. As reported by the *News*, the survey found that “the overwhelming majority of all Illinois jail inmates are almost completely idle.” Three weeks later inspectors from the United States Bureau of Prisons found “gang rule, racial segregation and unsanitary conditions” in the Chicago House of Correction. Chicago *Daily News*, Jan. 21, 1970; Chicago *Sun Times*, Jan. 22, 1970.

¹⁰Frank was required by the terms of his probation to make monthly reports to his probation officer, associate only with law abiding persons, maintain reasonable hours, work regularly, report all job changes to his probation officer, and not leave the probation district without permission, 395 U.S. at 151 n.6.

generally considered that imposition of the fine by a trial court is "tantamount to a declaration that neither the safety of the community nor the welfare of the (petitioner) require(d) (his) imprisonment. . ." (Sutherland and Cressey, *Principles of Criminology*, p. 277 (5th Ed. 1955)).¹¹ Similarly, the American Bar Association's Committee on Sentencing Standards regards imposition of a fine "an initial determination that jail—or at least the time which is due to non-payment—is unnecessary in terms of the protection of the public, the gravity of the offense, and other factors which normally determine the need for incarceration." (Tentative Draft, 1967, p. 121.) See also Rubin, Weihofen and Rosenzweig, *THE LAW OF CRIMINAL CORRECTION*, 254 (1963). Indeed, one of our most thoughtful observers of sentencing has argued that the criminal process should be invoked only by means of "the crude benchmark of deprivation of liberty that inheres in an actual or potential sentence of imprisonment" Packer, *The Limits of the Criminal Sanction* 273.¹²

¹¹This conclusion is also supported by the American Law Institute's Model Penal Code Provisions on Sentencing, § 7.02 (Proposed Official Draft, 1962), which provides that a fine should be imposed when the court is "of the opinion that the fine alone suffices for protection of the public."

¹²Professor Packer's view is premised in part on the notion that "The more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime" and he concludes that:

"If the most that we are prepared to exact in the great majority of occurrences of a particular form of reprehended conduct is the payment of money into the public treasury, we should not impose on ourselves the manifold burdens of invoking the criminal sanction. Whether the subject happens to be traffic offenses, or hunting out of season, or breaches of housing codes, or any one of the thousands of minor regulatory or sumptuary offenses with which the criminal sanction and its processes are presently encumbered, we ought to purge from the criminal calendar all offenses that we do not take seriously enough to punish by real criminal sanctions."

It is beyond doubt that those concerned with administration of criminal justice regard a fine as a sanction of a different order of criminal penalty, responding often to a different objective of the criminal law, than imprisonment. If this were not true, the jails would be empty, for imprisonment is far more costly to society, not to mention burdensome to the average criminal defendant, than a fine. See *People v. Hedenberg*, 21 Ill. App.2d 504 (1959). Thus to lump both fine and imprisonment together under the label of "punishment" does not imply that each results in the same deprivation. As a Report of the President's Commission on Law Enforcement and Administration of Justice observed in 1967: "Two unfortunate characteristics of sentencing practices in many lower courts are the routine imposition of fines on the great majority of misdemeanants and petty offenders and the routine imprisonment of defenders who default in paying fines. *These practices result in unequal punishment of offenders* and in the needless imprisonment of many persons because of their financial condition." *Task Force Report: The Courts* 18. (emphasis supplied). The Report recommends that society employ suitable alternative punishments so that those unable to pay will not be punished more severely than those of greater means.

Thus Illinois has sanctioned a penological regime which sets an absolute limit on imprisonment for any person with funds in his possession, regardless of the circumstances of his case, but permits a greater punishment—because 101 days in jail is far more onerous a punishment than the choice of paying the fine of \$505 or serving the sentence—over the defined maximum state interest in incarceration, in the case of the poor. What slim justification Illinois offers for singling out the poor for extended incarceration amounts to a contention that because [indigency] precludes the state from collecting the fine forthwith it must be entitled to imprisonment forthwith. Even assuming *arguendo* that some "necessity" of providing punishment for those who

cannot pay a fine would excuse imposition of a greater penalty, the Illinois practice does not satisfy the Fourteenth Amendment because the state has available to it collection devices far less subversive of equal protection than imprisonment. In this case appellant affirmatively alleged, and the state did not dispute, that if permitted his liberty he could and would obtain work and pay the fine. Although appellant could have avoided the extended sentence if he raised the \$505 before his one year prison sentence expired, the possibility, as William's alleged in this case, is an illusion. A man who does not have \$505 is incapable of earning it while incarcerated.

Thus, even the state's interest in collecting the fine is not advanced by extended incarceration. In the case of a defendant willing and able to pay the fine if given the opportunity, as to whom no suggestion of contumacious conduct is raised, cf. *Ariel v. Massachusetts*, ___ Mass. ___, 248 N.E.2d 496 (1969) appeal dismissed, 24 L.Ed.2d 468 (1970),¹³ the state is simply choosing to extend incarceration.

¹³ In *Ariel* the appellant was found guilty of seven motor vehicle violations. A municipal court judge fined the appellant on each complaint in amounts ranging from \$10 to \$300, for a total of \$510. Upon finding the appellant too poor to pay the fine forthwith, the judge sentenced the appellant to jail. The sole reason recited on the order of commitment for refusing to suspend the execution of the sentence was that "the Court finds the defendant unable to pay." On appeal, the Supreme Judicial Court of Massachusetts ordered that the municipal court judge submit "a complete recital of any findings of the court in addition to inability to pay" on which the court based its refusal to suspend execution of the sentence. The municipal court's additional findings, contained a discussion of appellant's prior defaults in appearances on certain motor vehicle violations and a finding that this "contumacious conduct" did not entitle appellant to time for payment. Although the Supreme Judicial Court noted that Massachusetts Law contemplates that a judge before committing to jail a defendant unable to pay a fine immediately, at least consider the desirability of extracting the fine over a period of time rather than automatically increasing the severity of punishment, it elected, nevertheless, to rest its decision affirming the judgment of the Municipal Court on these additional findings of probability of default.

tion without allowing a poor defendant the opportunity to satisfy the state's exaction. As Mr. Justice Jackson said in *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) "...no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow." Illinois is free to set the penalty for petty theft at one year and 101 days but once the maximum imprisonment which satisfies the interests of the state is defined at one year, making extended imprisonment applicable to those who could satisfy the fine if given the opportunity, but who do not have the requisite savings, the state has invidiously distinguished between defendants. As in *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969), Williams will have been subjected to "multiple punishments for the same offense", but in his case solely because of his poverty.

A further example of the manner in which Illinois has singled out indigents for excessive punishment is the state's construction of the Illinois statute which provides for discharge of certain classes incarcerated for nonpayment of fines and costs. Section 180-6 Ill. Rev. Stat. 1967 ch. 38 declares:

Whenever it shall be made satisfactorily to appear to the Court after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment."

The Illinois Supreme Court limited discharge under this statute to only that class of persons who are physically unable to work at the place of incarceration or when no

work was provided for them at such institutions (A.40). Certainly, if Illinois is prepared to discharge such persons it can hardly claim that incarceration of indigents is necessary to its administration of the criminal law.

As Illinois Law stands appellant is punished simply because he is an able-bodied poor person without savings. The fact that a defendant may be able to work but is without savings or employment,¹⁴ can no longer valid be made the basis for sentencing him to the workhouse. This "theory of the Elizabethan poor laws no longer fits the facts" (*Edwards v. California*, 314 U.S. 160 (1941)) of modern life. Cf. *Robinson v. California*, 370 U.S. 660 (1962). We are a society that has come to recognize that a man's poverty and unemployment often are something over which he has no control. Persons caught in the backwater of a rapidly advancing tide of economic growth should not be penalized because of that fact. Appellant's failure to have \$505 in his possession in the instant case is most accurately viewed as an involuntary symptom of his involuntary poverty.¹⁵

This does not mean that a non-indigent can be fined and an indigent cannot, thus perhaps raising some questions of discrimination against non-indigents. It is clear that alter-

¹⁴The irrationality of the \$5-A-Day statute is further highlighted when that amount is compared to what a person could earn outside jail on a modern wage scale. Compare 29 U.S.C. §206 (minimum wage \$1.60 per hour). In addition, a person in jail working off a fine remains in jail not just for the work day, but around the clock, and during such period is subject to all the strictures and deprivations of liberty which make up the regimen of others in the prison population.

¹⁵This view has been taken by many courts of late in declaring invalid many of our archaic vagrancy statutes. See, e.g., *Fenster v. Leary*, 30 N.Y. 2d 309, (1967); *Alegata v. Commonwealth*, 353 Mass. 287, 231 N.E. 2d 201 (1967); *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.Y. 1968); *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

native means for the state to achieve its ends exist, and where this is true the Constitution will not countenance such invidious discrimination against the poor. Illinois law creates a lien in favor of the state which permits execution against an offender's real and personal property, a fine enforcement system similar to the civil remedy of docketing a judgment with a view towards executing on a debtor's acquired property § 180-4, Ill. Rev. Stat. 1967, ch. 38.

Some states have written provisions for installment payments into state law,¹⁶ though trial courts often have inherent power to order installment payments without specific statutory authorization of installment payments.¹⁷ The experience of states and foreign countries with such a system has been successful. In West Virginia, even during the depression, only 5% of persons allowed to pay by installments needed to be committed. Commitments fell by 98% in Sweden and by 96% in Great Britain when installment payment systems were introduced. Note, *Fines and Fining—An Evaluation*, 101 U. Pa. L. Rev. 1013, 1023 (1953). Finally, a trial judge might impose on an indigent a parole requirement that he do specified work during the day to satisfy the fine. Cf. 50 App. U.S.C. § 456.

¹⁶ CAL. PEN. CODE Section 1205; MD. ANN. Code Art. 52 Sec. 18; MASS. ANN. LAWS ch. 279, Section 1A (1956); MICH. STATS. ANN. Sec. 28.1075 (1959); PA. STAT. ANN. title 19, Section 953-56 (1964); S.C. CODE ANN. Section 55-593 (1962); UTAH CODE ANN. Section 77-53-17 (1953); WASH. REV. CODE ANN. Sec. 9.92.070 (1961); WIS. STAT. Section 57-04 (Supp. 1965).

¹⁷ See *Martin v. Erwin* (USDC WD-La., January 25, 1968; Supplemental Order, February 27, 1968, Civil No. 13084), 12 WELFARE LAW BULLETIN 14, April 1968, CCH Property Law Reporter para. 750, p. 1752 where the district court on an application for a writ of habeas corpus reportedly held that the state court should have permitted the convicted indigent to pay his fine in installments and that providing the defendant with no alternative but to serve a sentence was a denial of equal protection of the laws. The court reportedly granted the writ of habeas corpus and ordered payment of the fines at the rate of \$25 per month.

It might be argued that a system of execution or installment collection would be more burdensome on the state than an assumed (dubious though it may be) ability of the state to enjoy the labor of a defendant while in prison. But the imposition of an extended prison term on indigent defendants cannot be justified on the ground of administrative convenience. As the Court said in *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966);

Any supposed administrative inconvenience would be minimal since repayment could easily be made a condition of probation or parole, and those punished only by fines could be reached through the ordinary processes of garnishment in the event of default.

Thus, § 1-7(k) is not saved by Illinois attempting to justify it as a means of "working off" the fine during incarceration. Defendants with funds are given the choice of merely paying the fine or serving a jail sentence, while indigents *must* remain incarcerated. Secondly, the state has available alternatives less infringing of liberty to collect the fine by means of installment arrangements or execution. Third, the \$5 a day rate of conversion of fine into labor is totally unrealistic in light of prevailing wage rates and thus creates a penalty far more severe for the poor. Finally, to the extent a defendant is unable to find work himself, the state through public employment services or public works programs is certainly bound to attempt to find it for him before remitting him to incarceration.

Nor does the use of § 1-7(k) in the cases of recalcitrant defendants who refuse to pay fines raise constitutional difficulties. When a court has determined that a defendant's failure to pay is due to his contumacy, there is no reason why statutes of this type, or indeed the contempt power, may not be used—consistent with the Fourteenth Amendment—to compel the stubborn defendant to pay his fine.¹⁸

¹⁸A manner in which this determination might be made is set forth in the provisions of the Model Penal Code, Proposed Official Draft, § 302.2 (1962):

But the Supreme Court of Illinois has not adopted such a limited construction of §1-7(k). There is, moreover, absolutely no indication of contumacy on the part of this appellant. The trial court found none, and appellant's affirmation of his indigency and willingness to pay the \$505, if given the opportunity, was accepted by the Illinois courts.

The state's attempt to justify incarceration to "work off" Williams' court cost of \$5 is also unnecessarily discriminatory. Costs are taxed against litigants in both civil and criminal cases as a means of financing the operation of the court system, and thus cannot be satisfactorily explained as serving one of the legitimate aims of the criminal law.¹⁹

"Consequences of NonPayment; Imprisonment for Contumacious Nonpayment;***"

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any installment, the Court, upon the motion of [insert appropriate agency of the State or local subdivision] or upon its own motion, may require him to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. Unless the defendant shows that his default was not attributable to a willful refusal to obey the order of the Court, or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the Court shall find his default was contumacious and may order him committed until the fine or a specified part thereof is paid."

¹⁹ Under the rule of *Lawyers Title of Phoenix v. Gerber*, 44 Ill. 2d 145, 254 N.E.2d 461 (1969) if Illinois sought to enforce its judgment against appellant in the same manner as in a civil action, it could not obtain body execution due to mere inability to pay. Even where malice exists, Illinois law requires a showing of refusal to pay.

Article II, §2 of the Illinois Constitution provides that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as should be prescribed by law, or in cases where there is strong presumption of fraud." This section relates, however, only to judgments arising out of contracts, expressed or implied, *Cox v. Rice*, 375 Ill. 357 31 N.E. 2d 786 (1947); *Petition of Blackledge*, 359 Ill. 482, 195 N.E. 3: (1935) *Buck v. Alex*, 350 Ill. 167 182 N.E. 794 (1932) and not to

As Illinois does not imprison the indigent taxed with costs in a civil action, it is difficult to conceive of some justification for doing so in a criminal case. Indeed, the requirement that time in prison be served in default of the payment of costs seems controlled by *Rinaldi v. Yeager*, 384 U.S. 305 (1966) which held a New Jersey statute requiring an unsuccessful defendant repay the cost of a transcript used on appeal violated the Equal Protection Clause. Compare *Strattman v. Studt*, 20 Ohio St. 2d, ___ N.E. 2d ___ (1969); see also *Anderson v. Ellington*, 300 F.Supp. 789, (M.D. Tenn. 1969); *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158, (1968). (Imprisonment for non-payment of costs violates Thirteenth Amendment).

Once it is conceded, as appellant believes it must, that 101 days required imprisonment is a significantly harsher penalty than the choice of paying fine or serving the prison term which is the punishment for a man with sufficient financial resources to pay immediately, the state's authorization of such a course of punishment in the circumstances of this case conflicts with the Fourteenth Amendment. A primary purpose of the Equal Protection Clause is to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other." *McLaughlin v.*

actions for the recovery of penalties inflicted for violations of the penal laws of the state. *People v. Zito*, 237 Ill. 434 86 N.E. 1041 (1909); *Kettles v. People*, 221 Ill. 221, 77 N.E. 472; (1906); *Kennedy v. People*, 122 Ill. 649, 13 N.E. 213 (1887). Nor does the constitutional provision apply to tort actions, *People v. Walker*, 286 Ill. 541, 122 N.E. 92 (1919) or to penalties for violation of municipal ordinances or costs in criminal proceedings, *City of Chicago v. Morrell*, 247 Ill. 383, 93 N.E. 295 (1911).

Florida, 379 U.S. 184, 192 (1964).²⁰ On the basis of the Equal Protection Clause this Court has acted to eliminate discrimination against the poor from state criminal procedure.²¹ In *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), it was held that

²⁰ Earlier decisions are not to the contrary. In *Ex Parte Jackson*, 96 U.S. 727 (1877), the Court was faced with a non-constitutional claim that a federal court exceeded its jurisdiction in committing a defendant until a fine of \$100 was paid. No claim of indigency was made and the court ruled only that "the commitment of the petitioner to the county jail, until his fine is paid, was within the discretion of the court under the statute."

In *Hill v. Wampler*, 298 U.S. 460 (1936) the Court merely held, inter alia, that a provision in a commitment for imprisonment for nonpayment of fine and costs which was inserted by a clerk was void. The court stated in dictum that "Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." (id at 463, 64.) No constitutional claim, no claim of indigency or that the commitment exceeding the maximum set by law seems to have been raised.

²¹ A long course of decisions under the Equal Protection Clause have struck down numerous state practices which differentiate between rich and poor in the administration of the criminal process. *Griffin v. Illinois*, 351 U.S. 12 (1956) (denial of free criminal trial transcript necessary for adequate appellate review); *Eskridge v. Washington State Board*, 357 U.S. 21 (1958) (denial, absent trial court finding that "justice will thereby be promoted," of free criminal trial transcript necessary for adequate appellate review); *Draper v. Washington*, 372 U.S. 487 (1963) (denial on trial court finding that appeal is frivolous, of free criminal trial transcript necessary for adequate appellate review); *Lane v. Brown*, 372 U.S. 477 (1963) (denial, absent public defender's willingness to prosecute appeal from denial of state *coram nobis* petition, of free transcript of *coram nobis* proceeding necessary to perfect state appellate jurisdiction); *Douglas v. California*, 372 U.S. 353 (1962) (denial, absent appellate finding that appointment of counsel on appeal would be of value to defendant or the appellate court, of free appointment of counsel on appeal as of right from criminal conviction); *Burns v. Ohio*, 360 U.S. 252 (1959) (denial

appellate review could not be granted in such a way as to discriminate against defendants on account of their poverty. In both cases, this Court emphasized that "there can be no equal justice where the kind of *trial* a man gets depends upon the amount of money he has." *Griffin v. Illinois*, supra at 19; echoed in *Douglas v. California*, supra at 355 (emphasis supplied). The corollary of this proposition is the one for which appellant argues: there can be no equal justice where the kind of *punishment* a man gets depends upon the amount of money he has. In fact, in appellant's situation the relationship between poverty and prejudice is far more direct. In *Griffin* and *Douglas*, one may only speculate that the defendant would have won his freedom if he had had the money to pay for a transcript; in the present case there is no need for speculation. If the appellant had had the money to pay the fine imposed, he would not have been imprisoned more than one year.

"Lines drawn on the basis of wealth or property, like those of race...are traditionally disfavored." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1965). Thus lines which discriminate on the basis of wealth are subject to the "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving v. Virginia*, 388 U.S. 1, 9 (1967). Only last term in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969) the Court made it plain the Equal Protection Clause requires

in default of \$20.00 filing fee, of motion for leave to appeal a felony conviction); *Smith v. Bennett*, 365 U.S. 708 (1961) (denial, in default of \$4.00 filing fee, of leave to file habeas corpus petition); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (indigent sentenced to prison may not be forced to pay for appeal transcript out of prison earnings). See also *Williams v. City of Oklahoma City*, 395 U.S. 458 (1969); *Gardner v. California*, 393 U.S. 367 (1969); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Roberts v. Lavalley*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

"A careful examination on our part . . . where lines are drawn on the basis of *wealth* or race. . . ." (Emphasis supplied). A law which discriminates on the basis of race, "even though enacted pursuant to a valid state interest . . . will be upheld only if it is necessary; and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, supra at 196; echoed in *Loving v. Virginia*, supra at 11.

Clearly punishment of thieves is a permissible state interest. However, the imposition of that punishment in such a way that the poor suffer more than the rich is not related (and certainly not necessary) to the accomplishment of the state's objectives of deterrence, intimidation or rehabilitation of wrongdoers. Illinois has argued that § 1-7(k) is constitutional because it treats rich and poor alike. But in *Griffin v. Illinois*, supra, the Court struck down the requirement for payment of costs as applied to indigents despite the fact that costs were required of both rich and poor alike. Justice Black observed:

"But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution as discriminatory against Negroes although that clause was by its terms nondiscriminatory. (citations)" (351 U.S. at 17, n.11)

Similarly, in *Harper* relying upon *Griffin v. Illinois*, supra, and *Douglas v. California*, supra,²² the Court ruled that a

²²In *People v. Saffore*, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966), the New York Court of Appeals held that to make "a defendant who has no money or property . . . serve out a fine at \$1 per day, in addition to the maximum term of imprisonment," violated both a state statute and the state and federal constitutions.

The essence of the court's holding is that where the trial court knows that the defendant is unable to pay the fine, it cannot attempt to imprison a defendant when the sole purpose of imprisonment is to collect the fine. A defendant cannot be coerced into payment if he

state poll tax violated the Equal Protection Clause because the tax (which was non-discriminatory on its face) was an invidious discrimination against the poor.

That the state need not, indeed cannot, equalize every advantage possessed by rich defendants hardly compels the result reached in this case by the Supreme Court of Illinois. Permitting indigent defendants such as appellant to earn the amounts required by their fines does not in any realistic way sap what may be the state's limited financial resources. Alternate means of collection, such as installment payment or execution, are available. Thus, appellant's submission merely amounts to an acknowledgment that when liberty is at stake the state has an obligation to cure a drastic impact of poverty on the administration of the criminal law when it can do so. Cf. *People ex rel. Herring v. Woods*, 37 Ill.2d 435, 226 N.E.2d 594 (1967) (pre-trial detention credited in order that total imprisonment not exceed maximum).

This case does not involve the question dealt with in several cases, e.g., *United States ex rel. Privatera v. Kross*, 239 F.Supp. 118 (S.D.N.Y. 1965) aff'd 345 F.2d 533, (2nd Cir. 1965), cert. denied, 382 U.S. 911 (1965), as to whether an indigent is deprived of equal protection of the laws when subsequent to failure to pay a fine he is imprisoned for a period which does not exceed the maximum prison term possible for the substantive offense. While such imprisonment of any indigent for nonwilful failure to pay a fine raises a serious constitutional question, it might be argued that the resulting imprisonment is justifiable on grounds

"has no money or property" with which to pay; therefore, the additional imprisonment in lieu of the fine can only have been intended as extra punishment, extending the punitive imprisonment beyond the statutory maximum. A unanimous court found that incarceration violated the excessive fine clause of the Eighth Amendment as well as the Equal Protection Clause because incarceration at \$1.50 per day "notably exceeds in amount that which is reasonable, usual, proper and just." (218 N.E.2d at 688). Accord: *Sawyer v. District of Columbia*, 238 A.2d 314 (D.C.App. 1968).

other than indigency. . . "The result may depend upon a particular combination of infinite variables peculiar to each individual trial." *North Carolina v. Pearce*, 395 U.S. 711, 722 (1969), see also § 1-7(g) Ill. Rev. Stat. 1967, ch. 38. Individualized sentencing, it might be contended, justifies a judicial classification which results in greater imprisonment being imposed on one who might satisfy the interests of the criminal law with a fine if he could pay it forthwith.

In the present case, however, Williams, could only be sentenced to more than a year in prison by reason of his indigency. Under Illinois law, no consideration of rehabilitation or community safety could accomplish the result reached of converting the \$500 fine and \$5 court costs into 101 additional days in prison. Indeed, Judge Weinfeld, the District Judge in *Privitera* recognized the distinction between that case and this:

"...the issues raised by petitioner would be more starkly presented in Federal constitutional terms had he been sentenced, as some defendants have, to the maximum permissible jail term and fined \$500, default to result in additional imprisonment of up to 400 days, or sentenced under a statute calling for a straight fine." (239 F.Supp. at 121)

Of course, one can seriously question the assumption that a period of imprisonment under an alternative fine-imprisonment sentence is generally among the class of sentences which are individualized unless trial judges inquire before pronouncing sentence, whether or not they are effectively giving a sentence of imprisonment or not. And coercion of a friend or relative to pay, while a possible *sub rosa* purpose, seems opposed to our fundamental understanding that no man should be penalized for the crimes of his friend or relative in which he himself did not participate. A defendant, moreover, should be entitled to "a fair hearing on the question of his ability to pay" and the judge should make "his decision with respect to the amount of the fine deliberately after such a hearing..." *Morris v. Schoonfeld*,

301 F. Supp. 158, 163 (D. Md. 1969), jurisdictional statement filed No. 782, October 28, 1969, 38 U.S.L. Week 3162.

But there is a fundamental difference between this case—in which only an indigent defendant is imprisoned for a period greater than that allowable by the statute which fixes the maximum penalty for the offense—and the case where the penalty of imprisonment imposed, though enhanced by failure to pay a fine, is nevertheless less than the maximum set by the legislature. In the former case the additional imprisonment responds to no valid objective of the criminal law, but rather to the defendants financial situation. In the latter, it is at least possible that the particular record may reveal circumstances which support the additional imprisonment. In short, a judge who sentences 30 days or 30 dollars may justifiably find that punishment, deterrence and intimidation require some immediate imposition of penalty of some sort greater than a future obligation to pay. His discretion to sentence certainly contemplates such judgments,²³ but conversion of indigency into jail time greater than that allowed for any other reason does not, by definition, respond to any particular judgment about a defendant or the needs of the criminal law. It is quite simply punishment for poverty.

CONCLUSION

The experience of appellant Williams is similar to that of countless other poor citizens who find themselves enmeshed in the criminal process. Arrested for a minor crime, he had already spent several weeks in jail when he came to trial because of his financial inability to make bail. Legal counsel being beyond his means, he was tried and convicted without

²³The situation is not totally unlike *North Carolina v. Pearce*, where the Court held that increased sentencing upon reconviction must be based upon:

“...events subsequent to the first trial that may have thrown new light upon the defendants ‘life, health habits, conduct and mental and moral propensities.’” (395 U.S. at 723).

an attorney. Given the maximum sentence allowable for the offense with which he had been charged, he learned that he would have to spend several additional months in jail solely because he was too poor to pay the fine and the court costs imposed upon him.²⁴

It is thus no accident that the National Advisory Commission on Civil Disorders has concluded:

"Some of our courts... have lost the confidence of the poor. The belief is pervasive among ghetto residents that... from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities. We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders." (Report of the Commission, p. 337 [Bantam, 1968]) (Emphasis added)

²⁴The problem of jailing indigents in lieu of fine has long affected large numbers of persons in this country. Thirty eight years ago the National Commission on Law Observance and Enforcement pointed out the inordinate number of offenders who were imprisoned for failure to pay fines. *Report on Penal Institutions, Probation and Parole*, 140-41 (1931). More recently, a study of the Philadelphia County jail showed that 60 percent of the inmates had been committed for nonpayment. In 1960, there were over 26,000 prisoners in New York City jails who had been imprisoned for default in payment of fines. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report; The Courts* 18, (1967). The Subin Report on the administration of justice in the District of Columbia found that out of a sample of 105 convicted defendants, 17 (or 16%) received a fine or imprisonment in default of payment sentence. Subin, *Criminal Justice in a Metropolitan Court*, pp. 88-89, (1966). The District of Columbia Crime Commission found in its study of 1183 persons sentenced, in the Court of General Sessions, 222 defendants (or 19%) were sentenced to a fine and to imprisonment in default of payment. Of these 105 persons could not pay the fine and were incarcerated. *Report of the President's Commission on Crime in the District of Columbia* 394, (1966).

A system which enforces the payment of fines by imprisonment predictably effects different treatment of defendants depending solely on whether they are with or without funds to pay the fine. Two persons, convicted of identical offenses, under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines, will walk out of court or be transported to jail depending entirely on how much money they have. A New York court put it this way:

"[I]t would seem that an exception [to the practice of imprisonment for nonpayment of fine] must be made in the case of an indigent defendant, because such a defendant will not be able to pay the fine although detained in jail for that purpose, nor does he have within his control the power to limit the period that he thus stands committed. To hold otherwise would add one more disadvantage which the law will place upon the indigent defendant, and one more advantage which the law will give to the defendant with the money in his pocket to pay his fine, although the quality of their conduct has been the same and although their intention to pay the fine has been the same."²⁵

In *Griffin v. Illinois*, 351 U.S. 12 (1956) this Court began to limit the range of permissible discrimination between rich and poor in criminal proceedings. The Court began with this premise:

²⁵*People v. Collins*, 47 Misc.2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965). See also *People v. McMillan* 53 Misc.2d 685, 279 N.Y.S.2d 941 (Orange County Court, 1967) where the Court held that the sentencing of a defendant to jail in lieu of payment of a fine where the court knew that the defendant was indigent and had no money to pay the fine violated the principles of equal treatment under law. In so holding the court declared: "In these times in which all of the engines of the criminal law are driving towards preserving and defending the rights of the indigent, our local courts should avoid resort to an archaic system akin to imprisonment for debt." *Id.* at 943.

"Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must so far as the law is concerned stand on equality before the bar of justice in every American court. (Id. at 12)

It concluded that:

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (Id. at 19)

To be sure this principle has its limits. For example, "A man of means may be able to afford the retention of an expensive, able counsel not within the reach of a poor man's purse." Id. at 23 (Mr. Justice Frankfurter, concurring). But when liberty is at stake, and certainly when alternatives are available to preserve legitimate state interests, the poor cannot be defined as a class worthy of greater punishment. In short, when a court deems it just that a defendant be punished for his crime by the payment of a fine, it cannot, through a strict system of imprisonment for failure to pay, erect a wall which prevents indigent persons from gaining their freedom while financially able defendants readily buy it.

For the foregoing reasons the judgment below should be reversed.

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